(4)

Supreme Court, U.S.
FILED
JUN 14 2004
OFFICE OF THE CLERK

No. 03-1375

In the
Supreme Court of the United States

THOMAS RYBICKI, FREDRIC GRAE,
GRAE, RYBICKI & PARTNERS, P.C.,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

HERALD PRICE FAHRINGER, ESQ.
Counsel of Record
ERICA T. DUBNO, ESQ.
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue, 32nd Floor
New York, NY 10017
(212) 319-5351

Counsel for Petitioners

Of Counsel:
EUGENE GRESSMAN, ESQ.
UNIVERSITY OF
NORTH CAROLINA
SCHOOL OF LAW
Campus Box #3380
Chapel Hill, NC 27599
(919) 962-3688

(Additional Counsel Listed on Reverse Side of Cover)

Of Counsel:

BARRY E. SCHULMAN, ESQ.
189 Montague Street, 8th Floor
Brooklyn, NY 11201
(718) 855-8855

EPHRAIM SAVITT, ESQ.
260 Madison Avenue, 22nd Floor
New York, NY 10016
(212) 679-4470

TABLE OF CONTENTS

	Page
Table of Authorities	iii
"If Not Now, When?"	1
The Conflicts Among the Circuits Over 18 U.S.C. § 1346 Are Not "Subsidiary" and Should be Resolved	3
Section 1346 Undermines Fundamental Principles of Federalism	5
The Solicitor General's Response Lends Force to the Pressing Need for Review by this Court of the Proper Test for Void-for-Vagueness Claims	6
Conclusion	7

TABLE OF AUTHORITIES

Carlson v. Green,
446 U.S. 14 (1980) 2

City of Chicago v. Morales,
527 U.S. 41 (1999) 6, 7

Cleveland v. United States,
531 U.S. 12 (2000) 5

PGA Tour, Inc. v. Martin,
532 U.S. 661 (2001) 2

United States v. Bloom,
149 F.3d 649 (7th Cir. 1998) 4

United States v. Brumley,
116 F.3d 728 (5th Cir. 1997) (*en banc*),
cert. denied, 522 U.S. 1028 (1997) 3

United States v. Frost,
125 F.3d 346 (6th Cir. 1997),
cert. denied, 525 U.S. 810 (1998) 4

United States v. Jain,
93 F.3d 436 (8th Cir. 1996),
cert. denied, 520 U.S. 1273 (1997) 4

United States v. Margiotta,
811 F.2d 46 (2d Cir. 1982),
cert. denied, 461 U.S. 913 (1983) 3

United States v. Rybicki,
354 F.3d 124 (2d Cir. 2003) (*en banc*) 2, 4

United States v. Salerno,
481 U.S. 739 (1987) 6

"If Not Now, When?"

Our Petition for Certiorari urged that 18 U.S.C. § 1346 is facially vague because in criminalizing, but without defining, a scheme to "deprive another of the intangible right of honest services," it fails to provide adequate notice to the public of what conduct is to be avoided. In addition, its lack of any standards of enforcement fails to channel the discretion of prosecutors and, instead, authorizes prosecutions that extend well outside the realm of federal concern.

Despite the recurring nature of this urgent constitutional issue, and the other serious questions that attach to § 1346, the government resists review based upon a claim that the vagueness challenge was not properly preserved. Additionally, although the government does *not* deny the division among the circuits, it urges, instead, that the split need not be addressed because it is on subsidiary issues. They are wrong on both counts.

Recognizing the substantiality of the issues implicated by § 1346, the Second Circuit invoked the rarely utilized *en banc* review to consider the Petitioners' vagueness challenge. As a consequence, the Second Circuit, in no less than *five opinions*, discussed fully every aspect of these issues on the merits. Although a narrow majority exonerated § 1346 on charges of vagueness, a significant membership of the court dissented and firmly asserted that the statute is fatally vague on its face. Thus, as indicated in our initial petition, this case presents *the* ideal platform for a definitive resolution of the perennial questions that continue to threaten the validity of § 1346.

In fact, the logical strength of the dissents, combined with the painstaking analysis of the majority, effectively frame the issues for this Court to decide.[1]

Furthermore, citing to decisions from six circuits,[2] the government states that the courts of appeals have *unanimously* rejected claims that § 1346 is void for vagueness (Br. for Solicitor General at 10). However, the rejections themselves were hardly unanimous where *en banc* proceedings from the Second and Fifth Circuits produced strenuous dissents. In fact, the roll of circuit court judges who have concluded that § 1346 is fatally vague — or expressed grave misgivings over the honest services doctrine — is astounding. For example, from the Second Circuit, the list includes Chief Judge John M. Walker Jr., Circuit Judges Dennis Jacobs, José A. Cabranes, Barrington D. Parker Jr.,[3] James L. Oakes, Thomas J. Meskill, Jon O.

---

[1] Even if the issue was not properly preserved, this Court is fully authorized to review a question of such constitutional magnitude. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (Court exercised its discretion to consider important question advanced in Petition for Certiorari and fully briefed by both sides); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (interests of judicial administration served by addressing the merits of a recurring issue which was not presented in the district court or the court of appeals).

[2] The Second, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits.

[3] *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (*en banc*).

Newman and Ralph K. Winter.[4] Circuit Judges E. Grady Jolly, Harold R. DeMoss Jr. and Jerry E. Smith of the Fifth Circuit have also voiced serious concerns regarding § 1346.[5]

This impressive core of jurists, who have denounced or questioned the honest services doctrine, lends significant force to our complaints and the urgent need for resolution by this Court. And, in light of the fact that these issues will persist through a continuing stream of petitions to this Court, and considering that divisions among the circuits will likely deepen, the time to address these questions is now.

The Conflicts Among the Circuits Over 18 U.S.C. § 1346 Are Not "Subsidiary" and Should be Resolved

Our Petition also established that Certiorari is warranted in this case because, as recognized by the dissenters from the Second Circuit, the "circuits are fractured" on at least *five* basic issues regarding § 1346 (App. 76):

1. The requisite *mens rea* to commit the crime;
2. whether the defendant must cause actual tangible harm;
3. the duty that must be breached;

---

[4] *United States v. Margiotta*, 811 F.2d 46 (2d Cir. 1982) (dissenting from denial of rehearing *en banc* and believing that the extension of the mail fraud statute warrants consideration of the "fundamental and recurring issue of whether the statute applies to schemes to defraud members of the public of intangible rights"), *cert. denied*, 461 U.S. 913 (1983).

[5] *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1028 (1997).

4. the source of that duty; and

5. which body of law informs us of the statute's meaning (App. 76).[6]

Rather than dispute the existence of these conflicts, the government tries to minimize the differences over questions concerning the construction of § 1346 by labeling them "subsidiary" (Br. for Solicitor General at 12). However, the *mens rea* of a criminal statute is hardly "subsidiary." Thus, contrary to the contentions of the government, there *is* an urgent need to resolve the significant conflicts that stem from the high quotient of ambiguity that afflicts § 1346 — and, which has so disrupted the uniform administration of this crucial arm of mail fraud prosecutions.

---

[6] For example, the Second and Eighth Circuits are split on whether a specific intent to cause actual harm is required. *Compare United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (App. 76), with *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996), *cert. denied*, 520 U.S. 1273 (1997). Similarly, the Second Circuit holds that any misrepresentation must be "material" whereas the Sixth Circuit requires only that it is "reasonably foreseeable" that the victim would suffer economic harm. *Compare Rybicki*, (App. 74), with *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998). There is a further division among the circuits as to what *mens rea* must be proved by the government. The Second Circuit requires only an intent to deprive another of the intangible right of honest services. *Rybicki*, (App. 37-38). However, the Seventh Circuit demands an intent to achieve personal gain. *United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998). This inventory of the festering conflicts is illustrative only, and by no means complete. A more comprehensive analysis is contained in Judge Jacobs' dissent (App. 73-74).

There is a need for uniformity in each of these areas of conflict to satisfy the constitutional necessities of the Equal Protection Clause.[7] The resolution and settling of these types of conflicts is precisely the primary office that this Court fulfills. Therefore, the split in the circuits over several critical issues tied directly to the construction of § 1346 is extremely important and should be considered by this Court.

Section 1346 Undermines Fundamental Principles of Federalism

The government suggests that this case does not implicate notions of federalism because § 1346 "does not establish a freestanding federal offense" (Br. for Solicitor General at 14). However, the elusive language of § 1346 enables federal prosecutors to significantly broaden the scope of *all* federal fraud statutes to "place under federal superintendence a vast array of conduct traditionally policed by the States." *See Cleveland v. United States*, 531 U.S. 12, 27 (2000). In view of the Court's concerns in recent cases such as *Cleveland*, review is certainly warranted in this case where the ambiguities of § 1346 actually encourage federal prosecutors to encroach in areas historically reserved to the States.

---

[7] For example, as § 1346 stands today, a person could be convicted and sentenced to 20 years in prison in one circuit without ever having intended to harm the victim, whereas in another circuit, that same person would be set free if the government failed to prove the obligatory *mens rea* requiring a specific intent to cause the victim pecuniary harm. This striking differential in consequences is constitutionally intolerable under any concept of equal protection of the law.

The Solicitor General's Response Lends Force to the Pressing Need for Review by this Court of the Proper Test for Void-for-Vagueness Claims

Our Petition for Certiorari emphasized the lack of consensus in this Court, and throughout the country, on the proper standard to be applied when the constitutionality of a federal criminal statute is challenged on its face. As a consequence, there is turmoil in our courts over what standard should be used to gauge a facial challenge, *i.e.*, whether "vagueness permeates the text" of the statute (*City of Chicago v. Morales*, 527 U.S. 41, 55 [1999]), or whether "no set of circumstances exists under which the Act would be valid" (*United States v. Salerno*, 481 U.S. 739, 745 [1987]). That division is particularly evident in this case, where the majority and dissenters in the *en banc* proceeding could not agree on what standard governs.

The government attempts to limit *Morales* to circumstances where an ordinance contains no *mens rea* requirement and infringes on constitutionally protected rights (Br. for Solicitor General at 14). Thus, the need to resolve the question of whether the *Morales* test should be limited to certain types of federal statutes is acute. Furthermore, the Solicitor General's stance on this issue amplifies the conflict instigated by *Morales*, which has *not* been limited by other courts to constitutionally protected liberty rights. And, review is particularly apt

here, where the *mens rea* required under the "honest services" doctrine is so unclear as to render it practically non-existent.[8]

In sum, rather than defeat certiorari in this case, the Solicitor General's response actually lends great force to the need for review by this Court.[9]

---

[8] In our case, the dissent recognized that § 1346 "flunks the test for facial vagueness set forth by the Supreme Court" in *Morales* (App. 61).

[9] It is disappointing that the Solicitor General would suggest that the gratuities received by employees of the insurance companies might have affected the settlements in some way. That is unsupported by the record and is inconsistent with the government's *concessions* that "inflation of the claims is not alleged" and there is no contention that the settlements were "inflated." Second Circuit Appendix at 356-57. Moreover, the majority *and* dissenting judges, in the *en banc* proceeding, referred to these payments as "gratuities" (App. 3, 73). The dissent even stressed that there was "certainly no reason for these defendants to believe that the gratuities at issue — which the government never contended caused a loss — amounted to a federal mail or wire fraud violation" (App. 73 n.1).

Conclusion

For all the foregoing reasons, as well as those raised in the original petition, the Petitioners pray that a Writ of Certiorari issue to review the Second Circuit's opinion in this case.

Dated: New York, New York
June 11, 2004

HERALD PRICE FAHRINGER, ESQ.
Counsel of Record
ERICA T. DUBNO, ESQ.
LIPSITZ, GREEN, FAHRINGER, ROLL,
SALISBURY & CAMBRIA LLP
780 Third Avenue, 32nd Floor
New York, New York 10017
(212) 319-5351

Counsel for the Petitioners

Of Counsel:

EUGENE GRESSMAN, ESQ.
UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW
Campus Box # 3380
Chapel Hill, North Carolina 27599
(919) 962-3688

BARRY E. SCHULMAN, ESQ.
189 Montague Street, 8th Floor
Brooklyn, New York 11201
(718) 855-8855

EPHRAIM SAVITT, ESQ.
260 Madison Avenue, 22nd Floor
New York, New York 10016
(212) 679-4470